Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1993

JANE ALICE PSARIANOS, ET AL.,

Petitioners,

v.

THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA), LTD.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did not the Fifth Circuit Court of Appeals commit reversible error when it held as a matter of law that judgment creditor Jones Act (46 U.S.C. § 688) widows had no cause of action against the Defendants' insurer, despite numerous State Supreme Court opinions to the contrary?

2. Can a Jones Act widow and judgment creditor be bound by an arbitration proceeding on insurance coverage to which she was not a party nor was given notice or an opportunity to be heard?

3. Assuming *arguendo* that such an arbitration proceeding is binding on the widow, can she be denied standing to contest the arbitration decision as fraudulent and a defacto default which otherwise destroyed her right as a judgment creditor to proceed directly against the insurer?

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PETITION FOR WRIT OF CERTIORARI

JANE ALICE PSARIANOS, Individually and as Personal Representative of the Estate of Efstratios Stavros Psarianos; CHRYSSOULA BESSIS, Individually, As Next Friend and Guardian of Georgios Bessis and Christos Bessis, and as Personal Representative of the Estate of Harilaos Georgios Bessis; ANGELIKI LATSOUDIS, Individually and as Personal Representative of the State of Dimitrios Stylianos Latsoudis; FOTINI MYLONAKIS, Individually and as Next Friend and Guardian of Theolayia Mylonakis, and as Personal Representative of the Estate of Pantelia Georgios Mylonakis; THEODORA SARLANIS, Individually and as Next Friend and Guardian of

Ioannis Sarlanis, and as Personal Representative of the Estate of Ioannis Evangelos Sarlanis; CHRISTOS STEFANOS BAMBAS, Individually and as Personal Representative of the Estate of Lambros Christos Bambas; PANAYOTIS CONSTANTINOS LIONTIS; LAMBROS IOANNIS MATSOUKAS; DIMITRIOS ATHANASIOS TSERGOULAS; ELEFTHERIOS DIMITRIOS KYPRIOTIS; ELIAS EFSTRATIOS MARKOTINIS; EVANGELOS NIKOLAOS POLYMEROS; and ANDREAS TSONIS MYLONAKIS, Individually and as Personal Representative of the Estate of Georgios Emmanuel Mylonakis and Andreas Emmanuel Mylonakis; AISE IMPRAIM, Individually, as Personal Representative of the Estate of Retsup Impraim, and as Next Friend of Oscan and Ainour Impraim, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeal for the Fifth Circuit entered in this matter on January 14, 1994.

OPINIONS, JUDGMENTS, AND ORDERS BELOW

The January 14, 1994 opinion of the Fifth Circuit is reported at 12 F.3d 461 and is reprinted herein, Appendix, App. 1. The Order and Reasons of the United States District Court for the Eastern District of Texas, Beaumont Division, is unreported and appears herein, Appendix, App. 10 and App. 14.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on January 14, 1994. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, §1:

"[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . . "

Rules of Decision Act, 28 U.S.C. §1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

The M/V THOMAS K, sank in international waters on February 1, 1984, killing the captain and eight crew members and seriously injuring seven additional crew members. Multiple wrongful death and personal injury actions were filed in the United States District Court for the Eastern District of Texas. Although the M/V THOMAS K was of Liberian registry, it was conceded from the outset that the vessel was owned and operated

by American citizens with a base of operations in New York, New York.

The Defendant shipowner, Eagle Transport, Ltd. (hereinafter referred to as "Eagle"), conceded from the outset that the Jones Act, 46 U.S.C. Section 688, was applicable to the case. Plaintiffs additionally claimed that the classification society, the American Bureau of Shipping, had itself been negligent in certifying the vessel.

The case commenced to trial before a jury, and on March 10, 1986, a verdict was returned in excess of $22 million, including compensatory and punitive damages, against the vessel owner, Eagle, and the vessel's classification society, American Bureau of Shipping.

Numerous post-trial motions were filed and extensively briefed by the parties. The vessel owner's third party action against it's own insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd. (hereinafter referred to as the "Association"), had been severed by the Court prior to trial. Raising arbitration as a defense, the insurer requested and received an Order on June 6, 1989 staying further proceedings against the insurer pending arbitration in London, allegedly as required by the insurance contract between Eagle and the Association.

Over a year post-judgment, now in the posture of judgment creditors of Eagle, plaintiffs initiated legal proceedings directly against the insurer, pursuant to Texas State law, both with regard to seeking a declaratory judgment as to insurance coverage and claiming incidental damages against the insurer pursuant to the Deceptive Trade Practices Act of the State of Texas. With regard to

the later claim, Texas law requires service in writing of the formal documents quantifying the claim with a requisite waiting period prior to suit being filed. Accordingly, by letters dated January 15, 1991 and January 17, 1991, the insurer was sent (1) a formal demand letter quantifying plaintiffs' claim and, (2) a copy of the Petition plaintiffs intended to file in the District Court of Jefferson County, Texas at the expiration of the statutory waiting period, Appendix, App. 16 and App. 19. The insurer was informed that the Petition sent to them was the one "the wrongful death/personal injury claimants will be filing in Jefferson County, Texas, against the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd."

Literally, in a "race to the courthouse", the Association filed in United States District Court a (1) Motion for Injunctive Relief prohibiting plaintiffs from filing any action in State Court and, (2) a "Cross-Claim" for declaratory judgment against the plaintiffs. These maneuvers were performed prior to the expiration of the statutorily imposed waiting period under which plaintiffs were bound not to proceed. In pleading before the United States District Court, the Association candidly conceded that its Federal Court filing was precipitated solely by the plaintiffs' demand letter and accompanying Petition.

Plaintiffs argued that the explicit "race to the courthouse" by the insurer to effectively block State Court proceedings initiated by plaintiffs violated the Fifth Circuit's rule relative to parties' forum shopping to seek adjudication of defenses through the Declaratory Judgment Act, 28 U.S.C. Section 2201, when threatened with State Court action. See *Mission Insurance Co. v. Puritan Fashions Corp.*, 706 F. 2d 599 (5th Cir. 1983) and *Sandefer*

Oil & Gas, Inc. v. Duhon, 871 F.2d 526 (5th Cir. 1989). Plaintiffs argued that the District Court should decline jurisdiction to entertain a Declaratory Judgment request by the insurer under such circumstances. In a hearing relative to the insurer's request for injunctive relief, the Court specifically deferred deciding whether it would or would not retain jurisdiction under the Associations Application For a Declaratory Judgment.

On March 20, 1991, counsel for Eagle notified the Court as to the following:

> I have been instructed by my client, Eagle Transport, Ltd. and Mr. Peter T. Kikis to notify the Court that it and he do not plan to pursue London arbitration to which they were ordered as to forum for the dispute between Eagle and the U.K. P & I Club. . . . "

Counsel for Eagle informed the Court his client had no interest in pursuing arbitration on the insurance coverage question because the costs of arbitrating exceeded the potential recovery which the vessel owner might look forward to receiving even if the panel ruled in Eagle's favor. In response to the claim for a Declaratory Judgment denominated "Cross-Claim" by the Association, plaintiffs themselves filed a "Counter-Claim" against the insurer alleging, inter alia, the underlying contract of insurance was indeed applicable to the judgment debtor.

Before discovery was initiated, and to the great surprise of plaintiffs, on January 7, 1992, the Association filed a Motion to Confirm Arbitration Award and to dismiss the third party claim against it by the insured. Court documents revealed that a most unusual "arbitration proceeding" had transpired, resulting in a January 2,

1992, conclusion by an arbitration panel that there was no coverage under the applicable policy of insurance. As the facts surrounding the arbitration hearing unfolded, it became obvious that the proceedings were seriously deficient. Documents attached to the insurer's amended pleading requesting Summary Judgment and additional documents subsequently introduced into the record revealed that Mr. Peter Kikis, the ultimate individual owner of the vessel, had proceeded before the panel *pro se* after a "falling out" with his own London counsel. Apparently, this "falling out" resulted from a fee dispute between Mr. Kikis and Charles Russell, Solicitors, his retained counsel.

Mr. Kikis presented himself at the hearing without the aid of any exhibits, evidentiary submissions, or witnesses and without access to corporate files which were still in the possession of non-participating counsel. Plaintiffs were not advised of the hearing nor were they invited to participate. Needless to say, the hearing was merely perfunctory and a *de facto* default resulted in the conclusion by the arbitration panel that insurance coverage did not exist.

Equally suspicious was the expedited hearing date of the arbitration which had been advanced at a "special hearing" to which neither Mr. Kikis nor his counsel were a party. The arbitration which had originally been scheduled for February 24, 1992, was changed to November 7, 1991, on the Association's representation that this maneuver would significantly "shorten the issues in arbitration." Ironically, this expedited hearing date which was initiated at the request of the Association took place only

two weeks after the District Court had denied the Association's initial Motion for Summary Judgment and ordered that additional discovery be taken in order to present a proper record before the Court.

The District Court refused to review the arbitration decision and confirmed the arbitration award as to Eagle. It then went one step farther, holding that plaintiffs rights, *as judgment creditors* of Eagle, were also extinguished by the panel decision denying coverage. Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit. On appeal, Eagle refused to join in the proceedings or challenge the arbitration award.

The Fifth Circuit Court of Appeal panel below held that as a matter of law plaintiffs as *judgment creditors* had no cause of action directly against the insured and, further, plaintiffs were bound by the arbitration decision denying insurance coverage to Eagle and had no standing to appeal this unusual arbitration decision since it was not privy to the contract between Eagle and the Association.

Plaintiffs now seek review by this Honorable Court following the decision of the Fifth Circuit. By virtue of the announced decision of the shipowner not to participate in meaningful arbitration and by virtue of the shipowner's *de facto* default in arbitration, both the United States District Court and the United States Court of Appeal for the Fifth Circuit have held judgment creditor Jones Act plaintiffs lack standing to even challenge or seek review of an arbitration award relative to coverage. The reasons supporting the granting of writ of certiorari are compelling and are discussed below.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. The Fifth Circuit committed gross error by holding that the plaintiffs, as judgment creditors of Eagle, had no right to proceed directly against the Association. The Court stated "Moreover, as we explained, the law [of Texas] does not provide plaintiffs an independent basis for suing the Association" [opinion at page 10 citing *Warfield vs. Fidelity & Deposit Company*, 904 F. 2d 326, 327 (1990)].

Nothing could be further from the truth. The judicial determination of Eagle's liability placed plaintiffs in the position of Eagle's judgment creditors. Under Texas law, a judgment creditor is entitled to proceed directly against the insurer once the liability of the insured has been determined. *Getty Oil Company, et al vs. Insurance Company of North America*, 845 S.W.2d 794, 16 (Tex. 1992); *Great American Ins. Co. vs. Murray*, 437 S.W.2d 264, 265-66 (Tex. 1969); *State Farm County Mutual Insurance Company of Texas vs. Ollis*, 768 S.W.2d 722 (Tex. 1989); *Cowley vs. Texas Snubbing Control, Inc.*, 812 F.Supp. 1437 (S.D. Miss. 1992); *Roland vs. Allstate*, 370 F.2d 289 (5th Cir., 1966); and *P.G. Bell Company vs. USF&G*, 853 S.W.2d 187 (Tex. App. 1993). The fact that this case may be governed by "maritime" law does not lead to a contrary result. Several cases have held that federal admiralty law "neither authorizes nor forecloses a third party's right to directly sue an insurance company". *State Trading Corporation of India, Ltd. vs. Assuranceforeningen Skuld*, 921 F.2d 409 (2nd Cir., 1990); *Steelmet, Inc. vs. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir., 1986); and *Cushing vs. Maryland Casualty Company*, 198 F.2d 536, 538-539 (5th Cir., 1952), rev'd on other grounds, 347 U.S. 409, 74 S.Ct. 608 (1954).

Clearly, the Fifth Circuit's holding constitutes reversible error, being directly contrary to the law of Texas. Even in the maritime context, the rule of decision is the law of the forum state in matters of insurance. *Wilburn Boat Company vs. Firemen's Fund Insurance Company,* 348 U.S. 310, 75 S.Ct. 368 (1955). This Court need not give the usual deference to such a misapplication of state law. *Salve Regina College vs. Sharon L. Russell,* 499 U.S. 225, 111 S.Ct. 1217 (1991). In fact, a *de novo* review of state law issues is required. If the Fifth Circuit opinion stands, there will be a divergence between the state and federal courts within the state of Texas regarding a judgment creditor's right to proceed directly against the insurer once the insured has been cast in judgment. Consequently, this Honorable Court should correct the mistakes of the trial court and Fifth Circuit regarding the misapplication of Texas law, which contradicts this Court's decision in *Wilburn Boat Company vs. Firemen's Fund Insurance Company,* 348 U.S. 310, 75 S.Ct. 368 (1955).

2. The Fifth Circuit has held, in a "round-about" way, that plaintiffs were bound by the decision of the arbitration panel denying coverage to Eagle because they lacked standing to challenge the decision, not being privy to the contract of insurance between Eagle and the Association. Interestingly, the trial court had no such problem, implying plaintiffs did have standing to challenge the arbitration award which adversely affected their legal rights. The District Court found that the decision of the arbitration panel adjudicated the rights of the plaintiffs even though they were not parties to the proceeding nor were their interests represented.

The Fifth Circuit and District Court both sidestepped the real issue in this case: Whether or not a non-party can be bound by a decision of an arbitration panel pursuant to a *de facto* default which is adverse to its rights when it was not represented at the hearing, was not given notice of the hearing and was denied the opportunity to present any meaningful case.

Generally, a non-party who was not a participant in the arbitration proceeding cannot be bound by a decision of the panel. "Arbitrators do not have the power to bind a corporation which is not a party to the arbitration contract or voluntary participant in the arbitration proceeding." *American Renaissance Lines, Inc. vs. Saxis Steamship Company*, 502 F.2d 674, 677 (1974) citing *Orion Shipping and Trading Company, Inc. vs. Eastern States Petroleum Corporation of Panama, S.A.*, 312 F.2d 299 (2nd Cir., 1963), *cert. denied*, 373 U.S. 949, 83 S.Ct. 1679 (1963).

Many lower courts have carved out an exception to this general rule in cases where the rights of the non-party were adequately represented by the party in privity who presented itself before the panel. In *Gvozdenovic vs. United Air Lines, Inc.*, 933 F.2d 1100 (2nd Cir., 1991), it was held that a party was bound under a collective bargaining agreement to submit to arbitration a dispute over seniority. The Court reasoned that although Gvozdenovic was not an employee at the time the collective bargaining agreement was entered, he was nonetheless bound by decisions of the arbitration panel since his interests were identical to those of other employees.

Similarly, in *Isidor Paeiwonsky Assocs. vs. Sharp Properties, Inc.*, 998 F.2d 145 (3rd Cir., 1993), a third party not

before the arbitration panel was bound by the panel's decision:

> "Bared's and ARI's interests are directly related, if not in fact congruent. It can fairly be assumed that within the arbitration proceedings ARI advanced arguments protective of Bared's interests." *Id.* at page 155.

Notably, in all of these "exceptional" cases, there is one common thread; the interests of the person actually before the arbitration panel (who was a party to the underlying contract that established arbitration as an alternative forum) and the non-party who is not before the panel are congruent. This fact distinguishes these cases from the case at bar.

Here, Eagle has consistently announced its disinterest in pursuing meaningful arbitration. Eagle informed the District Court that it had no intention of pursuing arbitration in London. Eagle discharged counsel in London and met with U.S. counsel in London prior to the arbitration but declined to invite counsel to arbitration, Appendix, App. 39. A predictable *de facto* default decision was entered. Subsequently, when the Association filed pleadings to confirm the arbitration award, Eagle did not oppose the motion. Then after Plaintiffs themselves appealed on their own and Eagle's behalf, Eagle failed to file a brief with the Fifth Circuit, thereby effectively ending any involvement it might have with this litigation.

In no way, shape or form can Eagle be said to "represent the interest of the Plaintiffs" under these circumstances. In fact, the opposite is true. Plaintiffs obtained an adverse judgment against Eagle for many millions of

dollars. If the shipowner was not insolvent (which was conceded by both parties in brief to the Court of Appeal), a much different scenario would exist. Then Eagle would have every incentive to fight the coverage denial. Being insolvent, Eagle had absolutely no incentive to assert its own rights, much less protect the rights of plaintiffs.

Another important distinction between the cases previously mentioned and the instant case is the relative bargaining power of the parties (or non-parties) involved. Even the non-parties had the opportunity to bargain. Here, plaintiffs had no such opportunity. They are helpless victims. A Writ of Certiorari should respectfully be granted herein pursuant to Rule 10(1)(b) of the Rules of this Court by virtue of the Fifth Circuit's conflicting views of "standing" in arbitration with those of the Second and Third Circuits.

3. With an unconscionable stroke of the pen, the Court of Appeal dismissed the Plaintiffs' challenge of the *de facto* default arbitration proceeding, holding that Plaintiffs had no standing, as a non-party, to attack the decision denying coverage. The Court stated that the "relevant provisions of the Federal Arbitration Act, 9 U.S.C. §§201-208 (1993), do not confer such standing on parties not participating in arbitration."

The Court's reasoning is fatally flawed in that Plaintiffs do not seek to assert their cause of action against the Association under the Federal Arbitration Act. Rather, Plaintiffs have brought an action against the Association directly pursuant to their status as judgment creditors of Eagle under Texas State Law and challenge the conclusive nature of this arbitration under the Act.

Ironically, in *Roland vs. Allstate Insurance Company*, 370 F.2d 289 (5th Cir., 1966), the insurer raised the issue of the injured party's standing to appeal the denial of insurance coverage to the insured. There the Court held:

> "Surely, if an injured party can seek enforcement of a judgment directly against the insurer, he can appeal from a verdict holding the insurer free from liability in a declaratory judgment action brought by the insurer." *Id.* at 291.

In *Roland*, the insurer's contention that the injured party had no standing to appeal the denial of coverage "deserved little more than passing mention" as the Court found that the injured party did have standing to appeal a decision adversely affecting their rights. This is identical to the case at bar. As judgment creditors of Eagle, Plaintiffs have a right to proceed directly against the Association and consequently have a right to appeal a decision denying insurance coverage. Surely this Court will agree that the Fifth Circuit's misconstruction of the Federal Arbitration Act demands review pursuant to Rules 10(1)(b) and (c) of this Court.

CONCLUSION

In this case the very party (Eagle) who was cast in judgment for three million dollars in punitive damages and millions more in compensatory damages has attempted the proverbial "last laugh" on the plaintiff widows by presenting no defense in arbitration and defaulting on the issue of insurance coverage. That a recalcitrant and bitter bankrupt shipowner would

attempt such a maneuver is no surprise in the context of maritime personal injury litigation. However, that a United States District Court and Court of Appeals would block *any* review of the fictitious "arbitration decision" on the basis of lack of "standing" by judgment creditors shocks the conscience of even the most jaded among us and cries out for justice. A Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Jane Alice PSARIANOS, et al.,
Plaintiffs-Appellants,

v.

STANDARD MARINE, LTD., INC., et al., Defendants.

EAGLE TRANSPORT, LTD., Defendant-Third Party Plaintiff-Appellant,

v.

UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA), LIMITED, a/k/a United Kingdom P & I Club, Third Party Defendant-Appellee.

No. 92-4486.

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1994.

After plaintiffs in personal injury and wrongful death actions arising from sinking of vessel obtained judgment in excess of $22 million against vessel owner, vessel's protection and indemnity insurer declined to cover any liability. Vessel owner and others instituted third-party proceedings against insurer claiming breach of insurance contract and seeking indemnification for amount of judgment. Insurer's motion for compel arbitration was granted, and while arbitration was pending, plaintiffs expressed intention to initiate action against insurer in state court. Insurer requested declaration that plaintiffs had no claim against insurer. Plaintiffs filed counterclaim seeking declaratory judgment that insurance contract covered liabilities of vessel owner and that plaintiffs were

entitled to proceed directly against insurer. Arbitration panel found that insurer's obligation would arise only when vessel owner paid judgment, which owner had yet to do. The United States District Court for the Eastern District of Texas, Howell Cobb, J., 790 F.Supp. 134, confirmed arbitration award and dismissed plaintiffs' counterclaim. Plaintiffs appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) district court did not abuse its discretion in entertaining insurer's motion for declaratory judgment, despite plaintiffs' desire to proceed directly against insurer in state court; (2) plaintiffs did not have any direct cause of action under either English or Texas law against insurer; and (3) as party not participating in arbitration, plaintiffs lacked standing to challenge district court order confirming arbitration award in favor of insurer.

Affirmed.

C. John Caskey, Thomas Peterson, Baton Rough, LA, Benton Musslewhite, Patrick Barret, Houston, TX, for appellants.

Jack L. Allbritton, Houston, TX, for appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before POLITZ, Chief Judge, HIGGINBOTHAM, Circuit Judge, and PICKERING*, District Judge.

---

* District Judge of the Southern District of Mississippi, sitting by designation.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

We hold that the victims of an accident on the high seas lack the requisite special relationship to proceed directly against the insurer of the parties at fault for causing the accident.

I.

The M/V Thomas K sank in international waters on February 1, 1984. Plaintiffs, the surviving crew members and the survivors of the deceased crew members, brought personal injury and wrongful death actions in the United States District Court for the Eastern District of Texas against the vessel's owner, Eagle Transport Limited, Inc., its manager and operator, Standard Marine Ltd., the alleged alter ego of Eagle and Standard Marine, Peter Kikis, and the American Bureau of Shipping. After trial, a jury returned a verdict in favor of the plaintiffs in excess of $22,000,000. United Kingdom Mutual Steamship Assurance Association, the vessel's protection and indemnity insurer, declined to cover any liability. Eagle Transport, Standard Marine and Kikis instituted third party proceedings against the Assurance Association claiming breach of an insurance contract and seeking indemnification for the amount that they were required to pay to the plaintiffs. The district court then granted the Association's motion to compel arbitration as required by the insurance contract and in the interim stayed proceedings on the coverage issue.

While the arbitration was pending, the plaintiffs expressed their intention to initiate an action against the Association in Texas state court. The Association

responded by requesting the district court to declare that plaintiffs had no claim against the Association. The plaintiffs filed a counter-claim seeking a declaratory judgment that the insurance contract provided by the Association covered the liabilities of Eagle and that the plaintiffs were entitled to proceed directly against the Association.

The arbitration panel found that Eagle had not complied with the insurance contract under the indemnity policy. The panel also found that the Association's obligation would arise only when Eagle paid, which Eagle has yet to do. As a result, Eagle could not recover from the Association. The district court confirmed the arbitral award and dismissed plaintiffs' claim against the Association, 790 F.Supp. 134.

Plaintiffs challenge the district court's exercise of jurisdiction over their claim, the district court's declaratory judgment against them, and the underlying arbitral award. We find that the district court did not abuse its discretion in exercising jurisdiction over plaintiffs' claim, that the district court's declaratory judgment was sound, and that plaintiffs lack standing to attack the arbitral award.

II.

We first identify the proper appellants. The Association has moved to dismiss Eagle's appeal. Eagle has not filed a brief on appeal, or adopted plaintiffs' arguments. We have no reason to believe that Eagle wishes to pursue this matter or, if it does, that it would pursue it in the way the plaintiffs have chosen. We dismiss Eagle's appeal. See Rule 31(c) FRAP.

III.

Plaintiffs first argue that the district court should not have entertained the Association's motion for a declaratory judgment. When the Association moved for declaratory judgment, the plaintiffs had already indicated their intention to proceed directly against the Association in state court.[1] Plaintiffs argue that the district court should not have allowed the Association to deny the plaintiffs the choice of forum in which to litigate their claims.

We must determine whether the district court abused its discretion in hearing the declaratory judgment action. *Sandefer Oil & Gas, Inc. v. Duhon,* 871 F.2d 526, 528 (5th Cir.1989) (citing *Mission Insurance Co. v. Puritan Fashions Corp.,* 706 F.2d 599, 601 & n. 1 (5th Cir.1983)) ("our review of the district court's exercise of discretion to hear a declaratory judgment action is limited to whether the court abused its discretion"). In particular, the abuse of discretion standard applies to the district court's decision whether to stay or dismiss a declaratory judgment suit in deference to a state court action. *Magnolia Marine Transport Co. v. Laplace Towing Corp.,* 964 F.2d 1571, 1581 (5th Cir.1992).

A district court may refuse declaratory relief for one of several reasons: the matter may be before a state court capable of resolving all the issues between the parties; the declaratory complaint may have anticipated another suit

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[1] The plaintiffs notified the Association before filing suit in an effort to satisfy the requirements of the Texas Deceptive Trade Practices – Consumer Protection Act. *See* Business and Commercial Code of Texas, § 17.41 et seq. (1993).

and may allow forum shopping; the complaint may allow the plaintiff to gain precedence in time or forum; or it may inconvenience the parties or the witnesses. *Id.* (quoting *Rowan Cos. v. Griffin*, 876 F.2d 26, 29 (5th Cir.1989)).

Plaintiffs originally filed suit in federal court. The Association later filed its motion for summary judgment. The plaintiffs filed a counter-claim in federal court and did not sue in state court. Plaintiffs chose the district court, and we do not find that the district court abused its discretion in forcing plaintiffs to pursue all aspect of the case in a single forum.[2]

IV.

Second, plaintiffs claim that the district court erred by dismissing their claims against the Association. They argue that the laws of both Britain and Texas provide them a cause of action against the Association. They are mistaken on both counts.

Plaintiffs cite *Morewitz v. West of England Ship Owners Mut. Protection & Indem. Ass'n*, 896 F.2d 495 (11th Cir.1990) as support for their claim that under English law they have a cause of action against the Association. Plaintiffs argue that the court in *Morewitz* interpreted an English bankruptcy act, The Third Parties (Rights Against Insurers) Act of 1980, as creating for a party in a position

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[2] Plaintiffs argue that the *Burford* abstention doctrine required the district court to decline to resolve this case. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). We need not consider this argument as plaintiffs raise it for the first time in their reply brief.

to benefit from insurance a cause of action directly against an insurance company one the insured has become bankrupt. The court did not have reason to recognize such a cause of action. Neither did it decide, as plaintiffs claim, that the direct action statute would defeat a defense based on the requirement that the insured pay its obligation before the insurer would become liable.[3] Rather the court of appeals held that the district court did not lack subject matter jurisdiction over the marine insurance claim simply because plaintiff based the claim on a direct action bankruptcy statute. *Id.* at 500.

The House of Lords in *Firma C-Trade S.A. v. Newcastle P. & I. Ass'n*, Lloyd's Rep. (Vol.2) 191 (H.L.1990), decided when a party in a position to recover from an insured may file suit directly against an insurer. When the terms of the insurance require the insured to pay its obligation before it may collect against the insurer, the House of Lords held, the insured must pay before any other party can sue on the contract. *Id.* at 197. Plaintiffs acknowledge that Eagle has yet to satisfy the judgment against it. Indeed, they pursue this suit against the Association precisely because Eagle has failed to pay. Because under English law, such payment is a "condition precedent" to a direct suit against the insurer, plaintiffs cannot proceed under English law.[4]

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[3] Indeed, the Eleventh Circuit did not so much as conclude that the British direct action statute applied in the case before it rather than American state law. *Id.* at 499 n. 5 ("the forum state's law may be the applicable law for purpose of applying any direct action statute") (citations omitted).

[4] For the Bankruptcy Act to have effect, the plaintiffs also have to establish that the insured was bankrupt or had been

Plaintiffs' recourse to the laws of Texas is similarly unavailing. Plaintiffs correctly note that Texas allows an employee to sue directly a carrier of workers' compensation insurance. *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210, 212 (Tex. 1988). This right is merely a special instance of the general rule that in Texas every insurer owes a duty "to deal fairly and in good faith with its insured in the processing and payment of claims." *Id.* As Texas courts treat the workers' compensation scheme of the state as a "three-party agreement" between the insurer, the employer, and the employee, this approach is unexceptional. *Id.* It casts little light on whether parties that stand to benefit from an insurance policy may proceed directly against the provider of the policy or whether only the insured or a third party beneficiary has that right.

We have already considered the contours of Texas law on this matter. In *Warfield v. Fidelity and Deposit Co.*, 904 F.2d 322 (5th Cir.1990), we addressed the circumstances in which a party that may benefit from insurance, but is not the insured or a third party beneficiary, may sue directly an insurance carrier. We held that Texas law requires "a direct and close relationship" between the party and the insurer. *Id.* at 326-27. Thus, for example, where an insurance company stated to a hospital that a

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"wound up." *Id.* at 195. Plaintiffs claim Eagle is insolvent. The Association suggests plaintiffs have offered no evidence to support this allegation. As plaintiffs have failed to meet the requirements to establish a claim under the Act, we need not and do not decide this issue.

prospective patient was covered by insurance, the hospital could then proceed directly against the insurance company in response to a denial of benefits to the patient. *Id.* at 327 (citing *Hermann Hops v. National Standard Ins.*, 776 S.W.2d 249 (Tex.Ct.App.1989)). Plaintiffs do not claim any such special relationship with the Association. Thus, as this court noted in *Warfield*, a "line limiting liability must be drawn somewhere and the appellants fall outside of this line." *Id.*

V.

Finally, plaintiffs challenge the district court's order enforcing the arbitral award in favor of the Association. They have no standing to do so. The relevant provisions of the Federal Arbitration Act, 9 U.S.C. §§ 201-08 (1993), do not confer such standing on parties not participating in arbitration. *See* 9 U.S.C. § 208 (1993) (incorporating, *inter alia*, 9 U.S.C. § 10); 9 U.S.C. § 10 (1993) (allowing "order vacating" an arbitration award "upon application of *any party to the arbitration*") (emphasis added); *McNair v. United States Postal Service*, 768 F.2d 730 (5th Cir.1985) (citing *Acuff v. United Papermakers and Paperworkers*, 404 F.2d 169, 171 n. 2 (5th Cir.1968)) (interpreting 9 U.S.C. § 10 to afford standing to challenge arbitration only to parties that participated in arbitration). Moreover, as we explained, the law does not provide plaintiffs an independent basis for suing the Association. *Warfield*, 904 F.2d at 326-27. Eagle, the other participant in arbitration, is not a party to this appeal. Under these circumstances, plaintiffs lack standing to challenge the underlying arbitral award.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JANE ALICE PSARIANOS, etc., Plaintiff	§	
VS.	§	C.A.NO.
STANDARD MARINE, LTD., INC., Defendant	§	B-84-298-CA

MEMORANDUM ORDER

(Filed March 27, 1992)

The M/V THOMAS K sank in international waters on February 1, 1984, killing the captain and eight crew members and seriously injuring seven additional crew members. Plaintiffs, the surviving crew members and survivors of the deceased crew members, brought personal injury and wrongful death actions against the vessel's owner, Eagle Transport Limited, Inc., its manager and operator, Standard Marine Ltd., the alleged alter ego of Eagle and Standard Marine, Peter Kikis, and the American Bureau of Shipping. The wrongful death and personal injury actions proceeded to trial on March 10, 1986, and the jury returned a verdict for the plaintiffs in excess of $22,000,000.00. Eagle Transport, Standard Marine and Kikis instituted third party proceedings against the United Kingdom Mutual Steamship Assurance Association ("the Club") claiming breach of an insurance contract and seeking indemnification for all sums that they were required to pay to the Psarianos plaintiffs.

At a summary judgment hearing on September 23, 1991, the Psarianos plaintiffs as judgment creditors asserted that the Court should not grant summary judgment in favor of the Club on the coverage issue because there was a fact issue as to whether the insurance contract between the Club and Eagle was indemnity or liability in nature. Further, the plaintiffs claimed that the arbitration clause was not enforceable as to them. The Court declined ruling on the motion, pending arbitration on the coverage issues. The arbitration was held in London, England on November 8-9, 1991. On January 2, 1992, the arbitration panel concluded that there was no coverage under the Rules of the Club for any loss arising from the sinking of the THOMAS K. Specifically, the panel found that the shipowner violated Rule 5(K)(iii).[1]

Before this Court is the Club's Motion to confirm the Arbitration Award. The Psarianos Plaintiffs and Eagle seek to set aside the Award, claiming that the arbitration was a farce. They contend that the arbitration panel acted capriciously (1) by advancing the trial date from February 24, 1992 to November 7, 1991; (2) by denying a request by George Renaudin, counsel for Eagle Transport, to postpone the hearing until Kikis could arrange substitute

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[1] *Rule 5(K)(iii).* The Owner must comply with all the Rules, recommendations and requirements of the Classification Society relating to the entered ship within the time or times specified by the society.
Unless and to the extent that the Directors otherwise decide, an owner shall not be entitled to any recovery form [sic] the [Club] in respect of any claim arising during a period when the owner is not fulfilling or has not fulfilled those conditions.

counsel; and (3) by allowing Peter Kikis to act in the arbitration proceeding without benefit of counsel.

The parties initially scheduled the arbitration for February 24, 1992; however, in an attempt to shorten the proceedings and reduce costs, the arbitration panel changed the arbitration date to November 7, 1991. The parties to the arbitration were notified of the date change in late August. On or about August 22, 1991, Charles Russell Solicitors withdrew from representing Kikis and Eagle Transport. While Kikis had over two months to obtain counsel to represent his interests in the arbitration proceeding, he elected to proceed *pro se*. At the arbitration proceeding, the Club was represented by counsel, and Kikis appeared on behalf of the owners. The panel advised Kikis that he had 21 days to appeal the final Award. Kikis did not appeal the panel's decision; nor did he appear in the Eastern District of Texas to contest the Award at the confirmation hearing.

The standard of review of an arbitration award is one of deference. Thus judicial review of arbitration awards is extremely limited. *See Delta Queen Steamboat Co., v. District 2 Marine Eng'rs Ben. Ass'n, 889 F.2d 599, 602 (5th Cir. 1989).* The Congressional policy of promoting arbitration requires that courts avoid intruding unnecessarily into questions that have been settled by an arbitration process agreed to by the parties. *Anderman/Smith Co., v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990). Here, the parties contracted to arbitrate disputes and, therefore, must be bound by the arbitrators' decisions if possible. See *Antwine v. Prudential Bach Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990). Since the arbitration panel reviewed the Club Rules and heard factual representations by both

Kikis and the Club, this Court finds no infirmity in the Award. There is no basis for this court to invade the arbitrators' resolution of the dispute.

court to invade the arbitrators' resolution of the dispute. [sic]

Accordingly, this Court confirms the Award, thereby dismissing Eagle's third party claims and any judgment creditor's claims against the Club.

SIGNED this 27th day of March, 1992.

/s/ Howell Cobb
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JANE ALICE PSARIANOS, Et Al,	§	
	§	C.A.NO.
Plaintiffs,	§	B-84-298-CA
	§	
VS.	§	CONSOLIDATED
	§	WITH
STANDARD MARINE, LTD., Et Al,	§	NO. B-86-293-CA
	§	
Defendants.	§	

ORDER CONFIRMING ARBITRATION AWARD AND FINAL JUDGMENT DISMISSING THIRD-PARTY CLAIM
(Filed March 27, 1992)

Third party defendant, the United Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd. (hereinafter "the UK P&I Club"), having moved this Court pursuant to Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208, for an order confirming the January 2, 1992 final Award of the Arbitrators resolving disputes between the UK P&I Club and third party plaintiff, Eagle Transport. Ltd., and for the entry of final judgment dismissing third party claim, and after considering the motion and Eagle's response thereto, it appearing that the motion is meritorious, it is

ORDERED, ADJUDGED and DECREED that the January 2, 1991 final Award in favor of the UK P&I Club is confirmed in all respects and that judgment is entered dismissing the third party claim of Eagle Transport, Ltd. in its entirety with prejudice. The UK P&I Club shall recover from Eagle Transport, Ltd. its costs in this action, as well as the costs of the Award in the amount set forth

in para. 2(C) of the Award, and the costs of the Arbitration, as set forth in para. 2(B) of the Award. In the event the parties are unable to agree on the amount of such costs of the arbitration proceeding, they shall be determined in accordance with the Award.

Pursuant to Rule 54(b), the Court determines that there is no just reason for delay in the entry of this judgment and that it is a final judgment within the meaning of that rule.

SO ORDERED, this 27th day of March, 1992.

/s/ Howell Cobb
United States District Judge

C. John Caskey
A Professional Law Corporation
341 St. Joseph Street
Baton Rouge, LA 70802

C. JOHN CASKEY

Telephone: 504-343-9850
Telefax: 504-343-9857

January 17, 1991

United Kingdom Mutual Steamship
Assurance Association (Bermuda), Ltd.
c/o Thomas R. Miller & Son
International House
26 Creechurch Lane
London EC3A 5BA, ENGLAND

RE: M/V THOMAS K
Date of Loss: February 1, 1984

Dear Sirs:

I represent various widows and survivors complaining of the loss of human life and injuries as a result of the sinking of the M/V THOMAS K on February 1, 1984. I think you are both familiar with the loss and the various proceedings which have taken place in the United States and the United Kingdom since the date of the sinking. Additionally, by right of contractual subrogation my various clients hold from the owner, Eagle Transport, Ltd., certain causes of action of this corporation relative to its own Assurance Association, namely: The United Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd.

You are hereby placed on notice that you are directly accused of having violated the Deceptive Trade Practices Act of the State of Texas, United States of America, to-wit:

Section 17.41 et seq of the Business and Commercial Code of that State. In particular, it is alleged that, in appointing counsel and agents who purportedly represented the insured Defendant, but who, contrary to their solemn obligations and ethical duties, were in fact representing the interests of the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd. and the Association's efforts to determine a way to deny coverage and therefor acting with a serious conflict of interest in derogation of the rights of the insured and my clients, your Assurance Association violated the aforementioned Act.

Moreover, by impliedly representing, when Eagle Transport, Ltd. became a member of your Association, that the insured's claims would be handled with equal standing and fairness to all other members of the Association, but while singling out said insured in order to "set an example" and in order to deter what was considered to be less than satisfactory safety standards with regard to the work of classification societies and the maintenance of vessels, your association discriminated against the insured and, accordingly, violated the aforementioned Act.

It is further alleged that another regrettable violation of the aforementioned Act came when your Association elected to refuse "discration" in favor of Eagle Transport, Ltd. under Rule 5K of the Insuring Rules while having never failed to exercise such discretion in favor of a member theretofore, all the while citing a vague and indefinite discretion in denying coverage based upon farfetched citations to the aforementioned Rule 3K not remotely associated with the sinking in question.

Regrettably there is yet one other basis upon which it is alleged that you violated the aforementioned Act, to-wit: when your Association represented, regrettably, in a false and fraudulent manner, that the Association would in all manners and ways provide coverage and protection to Eagle Transport, Ltd., and the insured acted to its detriment in reliance on such representations.

Pursuant to the aforementioned Act, it is alleged that these particulars were done willfully and maliciously and moreover that both the insured and my clients were injured by the resulting and foreseeable financial collapse of the insured, Eagle Transport, Ltd.

It is requested, again pursuant to the aforementioned Act, that you pay a sum of money in favor of my clients in compensatory damages in the amount of $5,915,992.00 with interest at the rate of 7% from March 19, 1986, along with treble punitive damages in the amount of $20,747,976.00. It is also requested that you pay attorneys' fees in the amount of $1 million.

Thank you for consideration of this matter.

Very truly yours,

/s/ C. John Caskey
C. John Caskey

CJC:lm

CAUSE NO.___

JANE ALICE PSARIANOS, Individually And As Personal Representative Of The Estate Of Efstratios Stavros Psarianos; CHRYSSOULA BESSIS. Individually, As Next Friend And Guardian Of Georgios Bessis And Christos Bessis, And As Personal Representative of the Estate Of Harilaos Georgios Bessis; ANGELIKI LATSOUDIS, Individually And As Personal Representative Of The Estate Of Dimitrios Stylianos Latsoudis; FOTINI MYLONAKIS, Individually, As Next Friend And Theolayia Mylonakis, And As Personal Representative Of The Estate of Pantelia Georgios Mylonakis THEODORA SARLANIS, Individually, As Next Friend And Guardian Of Irini Sarlanis and Ioannis Sarlanis And As Personal Representative Of The Estate Of Ioannis Evangelos Sarlanis; CHRISTOS STEFANOS BAMBAS, Individually and As Personal Representative Of The Estate Of Lambros Christos Bambas; PANAYOTIS CONSTANTINOS LIONTIS; LAMBROS IOANNIS MATSOUKAS; DIMITRIOS ATHANASIOS TSERGOULAS; ELEFTHERIOS DIMITRIOS	:	IN THE DISTRICT OF JEFFERSON CCOUNTY, TEXAS

KYPRIOTIS; ELIAS EFSTRATIOS MARKOTINIS; EVANGELOS NIKOLAOS POLYMEROS; ANDREAS TSONIS MYLONAKIS, Individually, As Personal Representative of the Estate of Emmanuel Mylonakis, and as Next Friend and Guardian of Georgios Emmanuei Mylonakis and Andreas Emmanuel Mylonakis) and AISE IMPRAIM, Individually, As Personal Representative of the Estate of Retsup Impraim, and as Next Friend and Guardian of Oscan and Ainour Impraim,	:
Plaintiffs	:
VERSUS	:
EAGLE TRANSPORT, LTD. and THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOC. (BERMUDA) LTD.	:
Defendants	:

PLAINTIFFS' ORIGINAL PETITION

COME NOW, JANE ALICE PSARIANOS. Individually And As Personal Representative Of The Estate Of Efstratios Stavros Psarianos; CHRYSSOULA BESSIS, Individually, As Next Friend And Guardian Of Georgios Bessis, And As Personal Representative Of The Estate of Harilaos Georgios Bessis, Angeliki Latsoudis. Individually And As Personal Representative Of The Estate Of Dimitrios Stylianos Latsoudis; Fotini Mylonakis, Individually, As Next Friend And Guardian Of Theolayia

Mylonakis, And As Personal Representative Of The Estate Of Pantelia Georgios Mylonakis; THEODORA SARLANIS. Individually, As Next Friend And Guardian Of Irini Sarlanis and Ioannis Sarlanis and As Personal Representative Of The Estate of Ioannis Evangelos Sarlanis; CHRISTOS STEFANOS BAMBAS, Individually And As Personal Representative Of The Estate Of Lambros Christos Bambas; PANAYOTIS CONSTANTINOS LIONTIS; LAMBROS IOANNIS MATSOUKAS; DIMITRIOS ATHANASIOS TSERGOULAS; ELEFTHERIOS DIMITRIOS KYPRIOTIS; ELIAS EFSTRATIOS MARKOTINIS; EVANGELOS NIKOLAOS POLYMEROS; ANDREAS TSONIS MYLONAKIS, Individually, As Personal Representative of the Estate of Emmanuel Mylonakis, and As Next Friend and Guardian of Georgios Emmanuel Mylonakis and Andreas Emmanuel Mylonakis; and AISE IMPRAIM, Individually, As Personal Representative of the Estate of Retsup Impraim, and as Next Friend and Guardian of Oscan and Ainour Impraim (Hereinafter referred to as "Plaintiffs") complaining of EAGLE TRANSPORT, LTD. (hereinafter sometimes referred to as the "Insured Defendant") and THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LTD., (hereinafter sometimes referred to as the "insuring Defendant") and for cause of action would respectfully show the Court as follows:

I.

The Plaintiffs, all and singular with the exception of Jane Alice Psarianos, are domiciled in and residents of the Republic of Greece. Plaintiff Jane Alice Psarianos is

domiciled in and a resident of Jefferson County, Texas. The Defendant Eagle Transport, Ltd., is a corporation organized under the laws of the Country of Liberia with a principal place of business in the City of New York, New York. The Defendant United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd. is a Protection & Indemnity Association, in operation and function fulfilling the role of an insurance entity as it is commonly understood, organized under the law of Bermuda with a principal place of business in that Country. Both Defendants are amenable to general in personum jurisdiction being exercised over them in the State of Texas, and the underlying acts which gave rise to Defendant Eagle Transport, Ltd.'s liability unto Plaintiffs occurred within this State. Although Defendants maintain no regular office in Texas and have no agent for service of process in Texas, they have been doing business on a regular basis in this State as business is understood and defined by our Constitution and Long Arm Statute. Therefore, service of process may be had upon these Defendants directly through their agents in Texas and/or by and through the Secretary of State who is deemed to have been appointed their agent, by having the Secretary of State mail process directly to such Defendants via registered mail, return receipt to the following addresses:

Eagle Transport, Ltd. c/o Peter T. Kikis, 1067 Fifth Avenue, New York, NY 10128.

The United Kingdom Mutual Steam Ship Assurance Association (Bermuda), Ltd., c/o Thos. R. Miller & Son, International House, 26, Creechurch Lane, London KC3A 38A.

II.

Your Plaintiffs would show that the primary focus of this lawsuit centers upon events, both in terms of acts and omissions, which occurred in Jefferson County, Texas, all which is revealed by the hereinafter stated facts. In 1983 the M/V THOMAS K was a merchant cargo vessel laid up in the navigable waters of Jefferson County, Texas, when Defendant the United Kingdom Mutual Steam Ship Assurance Association (Bermuda). Ltd. altered the insurance status of the vessel to reflect that it was capable of conducting international ocean-going trade, this insuring Defendant having previously entered into an insurance contract with Defendant Eagle Transport, Ltd., at all times material the owner and operator of the vessel. The aforementioned M/V THOMAS K departed on an ocean-going voyage from Jefferson County, Texas and subsequently sunk on said voyage on February 1, 1984 in a maritime tragedy involving human death and injury of major proportions. Subsequent litigation ensued by the survivors and families of the decedents of the M/V THOMAS K against the Defendant Eagle Transport, Ltd. in Jefferson County, Texas, and on March 10, 1986, the case concluded with a trial on the merits in this County with a result in Plaintiffs' favor which will be more fully described below. Thereafter, in a Memorandum Opinion in a related claim by Defendant Eagle Transport, Ltd. against its own insurer, the United Kingdom Mutual Steam Ship Assurance Association (Bermuda). Ltd., the United States District Court for the Eastern District of Texas (Beaumont Division) held on June 6, 1989 that the insurer was amenable to personal jurisdiction in the State of Texas as a result of its activity in this

State and the aforementioned activity of its insured in this particular County. Moreover, your Plaintiffs invoke the terms and provisions of Article 4678 of the Revised Civil Statutes of the State of Texas. In connection with the foregoing statute, Plaintiffs would show that equal treaty rights within the terms and meaning of said statute exist between Bermuda and the United States. Plaintiffs point out that jurisdiction in the Federal Courts is probably not available for this cause of action in view of the fact that there is incomplete diversity and alienage. Therefore, Plaintiffs would show that the State Court in Jefferson County, Texas is the appropriate forum for this case both in terms of jurisdiction and verse.

III.

Your Plaintiffs would show that with respect to all events made the basis of this suit and all rights and remedies herein sought, the General Maritime Law of the United States and/or the Law of Texas should apply. The most significant relationship with all these events is with the State of Texas, when compared to any other potential alternative forum. In the alternative, Plaintiffs would show that if the court should decide that the law of Texas applies to some of the events herein, then your Plaintiffs place the Defendants upon notice that they will pursue their remedies under whatever foreign law may be applicable, including but not limited to The Third Parties (Rights Against Insurers) Act of 1930 of Great Britain as applied in Bermuda or as applied by a Court in the United States pursuant to the General Maritime Law of this Country.

IV.

On November 22, 1989, the United States District Court for the Eastern District of Texas (Beaumont Division) executed a final judgment in a certain matter captioned "Jane Alice Psarianos, et al vs. Standard Marina, Ltd., Inc., et al." Civil Action B3-B4-298-CA. In that action all Plaintiffs except Plaintiff Andreas Tsonis Mylonskis become creditors of Defendant Eagle Transport, Ltd. in the following respective amounts:

Fotini Mylonakis – $970,400.00 with interest at the rate of 7% from March 19, 1986.

Jane Psarianos, Individually – $681,440.00 with interest at the rate of 7% from March 19, 1986.

Jane Psarianos, On Behalf of Irimi Psarianos – $30,880.00 with interest at the rate of 7% from March 19, 1986.

Theodora Sarlanis – $219,440.00 with interest at the rate of 7% from March 19, 1986.

Christos Bambas – $73,032.00 with interest at the rate of 7% from March 19, 1986.

Angeliki Latsoudis – $486,480.00 with interest at the rate of 7% from March 19, 1986.

Chryssoula Bessis – $248,000.00 with interest at the rate of 7% from March 19, 1986.

Aime Impraim – $630,200.00 with interest at the rate of 7% from March 19, 1986.

Panayotis Liontis – $449,000.00 with interest at the rate of 7% from March 19, 1986.

Lambros Matsoukas – $390,540.00 with interest at the rate of 7% from March 19, 1986.

Elias Markotinis – $322,960.00 with interest at the rate of 7% from March 19,1986.

Evangelos Polymeros – $417,820.00 with interest at the rate of 7% from March 19, 1986.

Dimitrios Kypriotis – $562,900.00 with interest at the rate of 7% from March 19, 1986.

Dimitrios Tsergoulas – $562,900.00 with interest at the rate of 7% from March 19, 1986.

A certified copy of each judgment is encased hereto as Exhibit "A", adopted by reference herein, and incorporated as if copied in extremes.

V.

Although Plaintiff Loukia Tsonis Mylonakis was not a Plaintiff in the aforementioned action, she brought a separate complaint as a result of the death of her husband in the same tragedy in a certain action captioned "Andreas Tsonis Mylonakis vs. Standard Marine, Ltd., Inc., et al." Civil Action 78-87-0117-CA, United States District Court for the Eastern District of Texas (Beaumont Division), and on July 17, 1989, a final Judgment and Dismissal was entered in favor of Plaintiff Loukia Tsonis Mylonakis and against Defendant Eagle Transport, Ltd. in the amount of $800,000.00 with interest at the rate of 7% from July 17, 1989. That Judgment and Dismissal is final and executory.

VI.

Accordingly, Plaintiffs all and singular are judgment creditors of Defendant Eagle Transport, Ltd. in the

respective amounts hereinabove set forth, but in attempts to collect said judgment it has been revealed that Eagle Transport, Ltd. is entirely insolvent and/or bankrupt as a practical matter, its only asset having been the M/V THOMAS K. which was entirely lost on February 1, 1986 and all capital reserves having been extinguished on attorney's fees associated with the foregoing described litigation.

VII.

At all times material herein Defendant the United Kingdom Mutual Steam Ship Assurance Association (Bermuda), Ltd. was an insuring entity of Defendant Eagle Transport, Ltd. and had entered into an insurance contract with the latter to pay those sums which Eagle Transport, Ltd. might become obligated to pay as a result of its operation of the M/V THOMAS K. Moreover, Plaintiffs herein are not only judgment creditors of the insured, Eagle Transport, Ltd., but are also third party beneficiaries of the insurance contract between the two defendants named herein, to the end that Plaintiffs are now entitled to recover a judgment over and against the Defendant insurer named herein directly for all sums which the insurer's insured, Eagle Transport, Ltd., has become obligated to pay unto Plaintiffs.

VIII.

Despite express and implied covenant by the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd., to defend its insured Eagle Transport, Ltd., in wrongful death and/or personal injury litigation against

it instituted in the United States of America, the insuring Defendant willfully, wantonly and capriciously abandoned the legal defense of Eagle Transport, Ltd. before the aforementioned trial on the merits on the bad faith and erroneous assumption that the insured (a corporation whose sole asset was the M/V THOMAS K) either would not or could not satisfy a potential judgment against it by Plaintiffs and on the equally bad faith and erroneous assumption that the insurance entity's own self-serving characterization of its coverage as an indemnification contract would thus insulate it from any ultimate payment to the widows and survivors associated with the sinking of the M/V THOMAS K. Defendant Eagle Transport, Ltd. was thereby forced, in close proximity to the aforementioned trial, to hire substitute legal counsel of its own and deplete substantially all of its cash reserves in its own defense both during and after trial.

IX.

As a result of the aforementioned acts in bad faith by the insuring Defendant against its own insured, Eagle Transport, Ltd., Plaintiffs themselves became the victims of the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd.'s breach of contract and/or tortious activity when cash reserve which Eagle Transport, Ltd. could have used, and was willing ultimately to use, to compensate Plaintiffs were totally extinguished by legal fees and costs. Accordingly, both in the posture of third-party beneficiaries of the breached contract of insurants and in the posture of Plaintiffs' complaining of

the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd. in tort, Plaintiffs herein seek compensatory damages against the insuring Defendant in the full amount of the judgment previously entered against the insured and punitive damages in an amount exceeding the jurisdictional minimum of this Court.

X.

Plaintiffs would show the Court that the nature of the contract between the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd. and Eagle Transport, Ltd. was not, in fact, one of indemnification after actual payment by the insured but was rather direct primary insurance coverage, and prior to the sinking of the M/V THOMAS K the insuring Defendant directly paid defense costs and death claims associated with the operation of the vessel without initial payment by the insured. However, if the Court should hold that the insurance contract was one of indemnification and/or was not reformed by the actions of the insuring Defendants prior to the sinking of the M/V THOMAS K (which is denied), then in that event Plaintiffs would show the Court that pursuant to the equitable remedies afforded Plaintiffs under both the law of Texas and the General Maritime Law of the United States of America. The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd. is estopped from raising the defense of non-payment by Eagle Transport, Ltd. by virtue of (1) the insuring Defendant's own previous claims history in paying death compensation directly, and (2) the insuring Defendant's own bad faith in failing to defend its insured, thereby forcing Eagle Transport, Ltd. to deplete

in unnecessary defense costs the very cash reserves it had to tender payment to Plaintiffs in the first place.

XI.

The United Kingdom Mutual Steam Ship Assurance Association (Bermuda), Ltd. seriously violated, moreover, the terms and provisions of the aforementioned contract of insurance relative to hiring and appointing agents and counsel on behalf of Eagle Transport, Ltd. at the outset of this litigation. These appointed agents and counsel (some of whom eventually withdrew from the defenses of the insured in close proximity to trial) were only nominally representing the insured, but in reality were representing from the inception the insuring Defendant itself as it gathered information which it hoped would form the basis of a denial of coverage relative to the insured. Accordingly, pursuant to the applicable law of the State of Texas and the equitable provisions of the General Maritime Law of the United States of America, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda), Ltd. is Illegible coverage in this case on any theory whatsoever.

XII.

Moreover, plaintiffs would show that the insuring defendant has violated the Deceptive Trade Practices Act of the State of Texas. §17.41 et. seq., of the Business and Commerce Code, as follows:

A. In appointing counsel and agents who purportedly represented the insured defendant, but who, contrary to their solemn obligations and ethical duties, in fact were representing the interests of The United Kingdom Mutual Steam Ship Assurances Association (Bermuda) Ltd. and the Association's efforts to determine a way to deny coverage and therefore acting with a serious conflict of interest in derogation of the rights of the insured and plaintiffs herein.

B. In impliedly representing, when Eagle Transport, Ltd. became a member of the Association, that the insured's claims would be handled with equal standing and fairness to all other members of the Association. Plaintiffs would show that the insured was singled out by the insuring defendant in order to set an example by the insured and in order to deter what the insured deemed to be less than satisfactory safety standards with regard to the work of classification societies and the maintenance of vessels, to the end that the insured was discriminated against by the insurer simply because the insured had only one vessel under coverage and that vessel, indeed, had sunk.

C. In representing to the insured, when it was enrolled as a member of the Association, that it would be treated on an equal standing basis with regard to the exercise of "discretion" under Rule 5K of the insuring rules and, in this connection. The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd. has admitted that it has never failed to exercise such discretion in favor of a member heretofore, and despite the good faith actions of the insured at all times herein

(admitted by the insuring defendant) the insuring defendant has heretofore cited a vague and indefinite discretion in denying coverage based upon farfetched citations to the aforementioned Rule 5K not remotely associated with the sinking in question.

D. The insuring defendant represented that it would in all manners and ways provide coverage and protection to the insured, and the insured relied upon this representation that it would be treated fairly, that the terms of the policy and Association rules would be complied with insofar as the insured was concerned, and that the insured would be treated fairly and on an equal standing with all other members insured, which representation turned out to be false and fraudulent, and indeed were false and fraudulent at the time made by The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd. and, accordingly, constituted Deceptive Trade Practices.

As a result of the foregoing Deceptive Trade Practices, done willfully and maliciously, plaintiffs were injured by the resulting and foreseeable financial collapse of the insured, Eagle Transport, Ltd., and as a result plaintiffs herein are entitled to have their damages trebled in accordance with the terms and provisions of the aforementioned Deceptive Trade Practices Act and to recover attorney's fees, all as herein alleged.

XIII.

For all of the same reasons stated in the preceding paragraph, defendant The United Kingdom Mutual

Steam Ship Assurance Association (Bermuda) Ltd. demonstrated "bad faith" deceptive trade practices and improper, willful and malicious conduct that has been held to constitute a violation of Article 21.21 of the Insurance Code of the State of Texas, which provisions are now invoked. Plaintiffs would show that by reason of the conduct of the said defendant in derogation of Article 21.21, the plaintiffs are entitled to treble damages under the terms and provisions of said Statute and, indeed, plaintiffs seek a trebling of the actual damages sustained and plead herein with attorney's fees and any other penalties and interests provided for by the terms and provisions applicable.

XIV.

Plaintiffs are entitled to a declaratory judgment under the Declaratory Judgment Act of the State of Texas, in their favor and against not only Eagle Transport, Ltd. but also The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd., casting this insurer in judgment for sums owed by the insured, and Plaintiffs are entitled thereafter to proceed directly against the insuring Defendant for collection of the judgment.

WHEREFORE, premises considered. Plaintiff pray that both Defendants be cited to appear and answer herein as required by law, and upon hearing hereof that Plaintiffs receive the Declaratory Judgment prayed for over and against Defendants jointly and severally in connection with actual damages they have sustained and previously been awarded, as well as judgment over and against Defendant The United Kingdom Mutual Steam

Ship Assurance Association (Bermuda), Ltd. individually, for an additional sum in punitive damages in an amount exceeding jurisdictional minimum of this Court, including applicable interest, costs of court, and for such other and further relief, both at law and in equity, which Plaintiffs may show themselves justly entitled to receive.

Respectfully Submitted:

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Counsel for Certain Plaintiffs

BY: _____

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3200 Chevron Tower
1301 McKinney Street
Houston, Texas 77010-3033

March 20, 1991

0006

The Chambers of the Honorable Howell Cobb – *Via Hand Delivery*
United States District Judge for the
Eastern District of Texas
United States Courthouse
300 Willow Street, Room 2, Second Floor
Beaumont, Texas 77704

RE: *Jane Alice Psarianos, et al. vs. Standard Marine, Ltd., Inc., et al.* – C. A. No. B-84-298-CA, in the U. S. District Court for the Eastern District of Texas, Beaumont Division

Dear Judge Cobb:

I have been instructed by my client, Eagle Transport, Ltd. and Mr. Peter T. Kikis to notify the Court that it and he do not plan to pursue London arbitration to which they were ordered as the forum for the dispute between Eagle and the UK P&I Club. Attached hereto is a letter, dated 20 February 1991, from Solicitors Charles Russell, who have been acting for the claimants in the London proceedings. From the enclosed (page 2), the Court will see that the costs estimated to carry the arbitration to conclusion are £700,000 to £750,000 (pounds sterling), the equivalent at today's exchange rate of $1,400,000 to $1,500,000. In addition, the Club has announced it intends to apply for security for costs. The enclosed letter (page

3) indicates the figure for this will be £500,000 (pounds sterling), or $1 million. Since the claim in arbitration is $1 million or less, and since the losing party can have the successful party's costs, including solicitors' and barristers' fees, assessed against it as part of the award, it is quite obvious that this effectively deprives Eagle of pursuing its claim to conclusion.

Currently, the president of Eagle, Mr. Kikis, is out of the country and will not return until next month. Upon his return, an affidavit to the above effect will be presented to the Court.

Respectfully,

/s/ George W. Renaudin
George W. Renaudin

GWR/mfb

cc: Honorable Murray L. Harris – *Via Hand Delivery*
United States District Clerk
Eastern District of Texas,
Beaumont Division
U. S. Courthouse
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1111 San Jacinto Building
Beaumont, Texas 77701

EXHIBIT E

Our Ref: SLC/TGB/PP/CASKEY.ThosK
15 January 1991

Messrs Holman Fenwick & Willan
Marlow House
Lloyds Avenue
London
EC3N 3AL

SECOND LETTER

Dear Sirs

Thomas K

We enclose, for your information, a copy of the final draft of a Petition, which we understand the wrongful death/ personal injury claimants will be filing in Jefferson County, Texas, against the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited. The Club will, of course, be formally served with a copy of this Petition at the appropriate time.

Yours faithfully

/s/ Charles Russell
CHARLES RUSSELL

Enc

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JANE ALICE PSARIANOS, etc.,	*	
Plaintiff	*	
	*	
VERSUS	*	C.A. NO.
STANDARD MARINE, LTD., INC.,	*	B-84-298-CA
Defendant	*	

AFFIDAVIT

STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, personally came and appeared GEORGE W. RENAUDIN, who being duly sworn by me did depose and say the following:

THAT he makes this Affidavit at the request of counsel for the Psarianos Plaintiffs and in respect to Plaintiffs' Opposition to the Motions of the United Kingdom Mutual Steamship Assurance Association to enforce and arbitration award in its favor being promulgated on January 2, 1992 and in summary judgment against the Psarianos Plaintiffs;

THAT he confirms the shipowner in this case, Mr. Peter T. Kikis, is currently in the Country of Greece at a location or locations unknown and is logistically unavailable to assist in the production of any sworn affidavit relative to this Court's hearing on January 30, 1992, but

affiant is quite familiar on the basis of first-hand knowledge with much of the procedural history leading up to the arbitration award of January 2, 1992, and in this connection will attempt to acquaint the Court with these details;

THAT the Court will recall in early 1991, Mr. Kikis and Eagle Transport, Ltd. were represented in London arbitration proceedings by a law firm known as Charles Russell Solicitors and it was announced by London counsel for the U.K. club (much to Mr. Kikis' dissatisfaction) that the arbitration ordered by this Court would take approximately four months with concomitant legal fees by Mr. Kikis' solicitors estimated in excess of $1 million U.S., which sum equalled the out-of-pocket sums Mr. Kikis was claiming in arbitration in the first place;

THAT the arbitration was scheduled (by order of the arbitrators) to commence on February 24, 1992;

THAT by letter to the arbitration panel dated July 16, 1991, the U.K. Club solicitors requested a special hearing to consider whether the arbitrators should hold an abbreviated hearing in advance of the scheduled arbitration for disposal of so-called "preliminary issues," or really a first round of arbitration the effect of which would deny coverage in favor of an arbitration award to the Club;

THAT Mr. Kikis' solicitors Charles Russell requested the special hearing be postponed from August 1 to August 23, 1991 in order to properly prepare for a response to the Club's proposal, and the postponement was granted;

THAT the *day before* the special hearing, August 22, 1991, Charles Russell abruptly withdrew from the representation of Kikis and Eagle Transport, Ltd. and refused to attend the special hearing the next day;

THAT as the Reasons for and Forming Part of the Award of the Arbitrators indicates, "[o]n 22nd August Messrs. Charles Russell advised us that they were no longer able to represent the owners. Accordingly, the owners were not represented at the hearing on the application on 23rd August when we made an Order, a copy of which is attached to the Award.";

THAT in the special hearing on August 23 in which neither Kikis nor Eagle Transport, Ltd. were represented, the arbitration panel moved forward the date of the arbitration, at the request of the Club's solicitors, approximately four months to November 7, 1991;

THAT by letter dated August 23, 1991, I, on behalf of Kikis and Eagle Transport, Ltd., sent a letter to the arbitrators in this proceeding stating in material part: "[i]n view of the with withdrawal [of Charles Russell Solicitors] it is necessary for Eagle to ask for the indulgence of the arbitrators for a postponement until such time as Eagle is able to retain/instruct other solicitors or make other arrangements";

THAT my request for a postponement for Kikis and Eagle to obtain substitute counsel for Charles Russell was immediately denied by the arbitrators, concurrent with receiving notice that Eagle would have to be prepared to arbitrate this matter four months earlier than anticipated on November 7, 1991;

THAT an extreme difficulty encountered by Kikis and Eagle was the fact that a dispute had arisen with Charles Russell over the non-payment of alleged fees and costs, and in connection with that dispute Charles Russell informed Kikis and Eagle that it would release none of Eagle's files, documentation or arbitration papers unless their fees and disbursements were immediately satisfied;

THAT in the interval between the sudden withdrawal of Charles Russell and the November 7, 1991 arbitration date, neither Kikis nor Eagle were able to retrieve their paper and documents from their former London counsel and failed to arrange for substitute counsel to represent them;

THAT prior to November 7, 1991, Mr. Kikis traveled himself to London and made an unsuccessful bid to retrieve his files from Charles Russell in advance of the arbitration hearing;

THAT moreover, as a coincidence and certainly not in connection with this case, I happened to be in London on October 23, 1991 and met with Mr. Kikis for 2 hours prior to the arbitration commencing on November 7, 1991;

THAT I instructed Mr. Kikis as best I could and under the circumstances of what points he could raise pro se to the arbitrators, but to say that Mr. Kikis wa [sic] prepared to present his case in arbitration with the U.K. trial counsel and solicitors would be a gross understatement;

THAT the logistic problems of being without counsel and all attendant problems were raised to one of the

arbitrators by Mr. Kikis prior to the arbitration hearing, but to no avail;

THAT during the arbitration on November 7, 8 and 11, 1991, Mr. Kikis "represented" Eagle Transport pro se without benefit of counsel, without evidentiary submissions or exhibits, and without any witnesses;

THAT affiant does not know of any evidence that the arbitrators' Order of August 23, 1991, declaring that prehearing exchange of issues, discovery documents, witness statements, expert statements or skeleton arguments was ever followed by either party; and

THAT everything contained in this affidavit is true to the best of affiant's own knowledge, information and belief.

/s/ George Renaudin
GEORGE W. RENAUDIN

SWORN TO AND SUBSCRIBED before me this 24th day of January, 1992 in Harris County, Texas.

STAMP

/s/ Marilyn H. Berzeny
NOTARY PUBLIC
My Commission Expires:
June 3, 1993

FILED
MAY 13 1994
OFFICE OF THE CLERK

No. 93-1624

In The

Supreme Court of the United States

October Term, 1993

JANE ALICE PSARIANOS, ET AL.,

Petitioners,

v.

THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA), LTD.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1.

Did the Fifth Circuit Court of Appeals correctly rule that petitioners, as judgment creditors of a shipowner, (1) had no direct right of action against the shipowner's protection and indemnity insurer to satisfy their judgment, and (2) as strangers to the insurance contract, had no standing to assert extracontractual claims against the insurer?

2.

Did the Fifth Circuit Court of Appeals correctly rule that petitioners had no standing to contest an arbitration award regarding a marine insurance contract to which petitioners were not parties and in which petitioners had no rights?

LIST OF PARTIES

Respondent:

The United Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd.

Petitioners:

Jane Psarianos
Sale & Fatme Impraim
Aise Impraim
Irini Psarianos
Christos Bambas
Chryssoula Bessis
Lambros Matsoukas
Dimitrios Kypriotis
Vasilious Vlahos
Elias Markotinis
Loukia Mylonakis
Theodora Sarlanis
Angeliki Latsoudis
Panayotis Liontis
Evangelos Polymeros
Dimitrios Tsergoulas

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No. 93-1624

In The

Supreme Court of the United States

October Term, 1993

JANE ALICE PSARIANOS, ET AL.,

Petitioners,

v.

THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA), LTD.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondent, the United Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd., files this brief in opposition to petitioners' petition for certiorari.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 12 F.3d 461 and is reproduced in petitioners' appendix, A1-A9.

The memorandum order of the United States District Court for the Eastern District of Texas, Beaumont Division confirming the arbitration award is reported at 790 F. Supp. 135 and is reproduced in petitioners' appendix (A10-A13), and the order confirming the award and dismissing the third-party claim is unreported and is reproduced in petitioners' appendix, A14-A15.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners contend that the Due Process Clause of Amendment XIV, § 1 of the United States Constitution and the Rules of Decision Act, 28 U.S.C. § 1652, are involved.

STATEMENT OF THE CASE

Petitioners' arguments rest on an erroneous interpretation of the decisions of the Fifth Circuit Court of Appeals and the district court, and on an inaccurate, incomplete and misleading statement of the procedural history and the facts of this case.

Petitioners filed suit originally in the United States District Court for the Eastern District of Texas, Beaumont Division, for the deaths and injuries of members of the crew of the M/V THOMAS K, as a result of the sinking of the vessel on February 1, 1984. The vessel was owned by Eagle Transport, Ltd. ("Eagle") and its alleged alter ego, Peter T. Kikis. The vessel was entered with The United

Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd. (the "Association") for protection and indemnity insurance, according to the Rules of the Association.

Petitioners sued Eagle and others, including the American Bureau of Shipping ("ABS"). The Association declined to cover Eagle's potential liability to Petitioners, on the ground that certain of its Rules had been breached which voided the coverage. Eagle filed a third-party complaint against the Association for breach of the insurance contract. The Association moved to dismiss for lack of jurisdiction and, alternatively, moved to stay the third-party action and to compel arbitration of the insurance dispute according to the Association's Rules. The District Court severed the third-party action just prior to the trial of petitioners' claims against Eagle and ABS. In March, 1986 the injury and death claims were tried against Eagle and ABS, which resulted in judgments against both in favor of the petitioners. ABS subsequently settled. The judgment against Eagle remains unsatisfied. Neither Eagle nor Kikis have paid any part of that judgment. Contrary to the statement made by Petitioners in their Petition (p. 13), the Association has never conceded nor has there been any finding that Eagle or Kikis are insolvent.

The district court then dissolved its order of severance and reconsolidated the third-party action with the original suit. In a Memorandum Opinion, reported at 728 F. Supp. 438, the district court denied the Association's jurisdiction challenge, but granted the motion to stay and to compel arbitration. In the course of that decision the district court correctly determined that the contract of insurance between Eagle and the Association was one of

indemnity only: "Eagle is a member of the Club,[1] not simply an insured; and the coverage provided is indemnity, rather than liability." 728 F. Supp. at 451. The district court ordered Eagle and the Association to arbitrate in London the question of Eagle's entitlement to coverage, in accordance with the Association's Rules. The court stayed the remainder of the case pending arbitration.

In accordance with the district court's order for arbitration, Eagle and the Association each appointed London arbitrators. Those arbitrators chose an umpire. The Association relied on two principal reasons why Eagle was not entitled to recover for the underlying judgments in favor of the petitioners. First, Eagle had failed to comply with certain of the Rules, thus voiding all rights to indemnity. Second, the insurance contract was one of indemnity only, requiring Eagle to pay any judgment before being entitled to collect from the Association.

While the arbitration was pending, petitioners notified the Association that they intended to file suit in Texas state court directly against the Association in an attempt to collect their judgments against Eagle, as well as to assert liability on the Association for alleged bad faith and extracontractual damages under Texas law. Among other contentions, the proposed state court suit (Paragraph X, App. 29) alleged that the insurance contract was not one of indemnity, but rather was a liability

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[1] The term "Club," in marine insurance jargon, is an unofficial reference to mutual associations who provide "P and I," or protection and indemnity insurance, to vessel owners, who in turn are known as "Members."

policy entitling petitioners as judgment creditors to collect directly against the Association. Faced with the prospect of multiple lawsuits and arbitration seeking to adjudicate the same issues, with the possibility of inconsistent judgments, the Association sought injunctive relief in the district court, and also filed its cross-claim for declaratory judgment in the district court where petitioners' suit was originally filed and was still pending. In response to the Association's motion for an injunction to prevent petitioners from filing the threatened state court suit, petitioners stipulated in open court that they would not do so without notifying the court and counsel. Instead of filing the state court suit, Petitioners filed their own counter-claim against the Association for declaratory judgment on the coverage issues. In their Statement of the Case (p. 5), petitioners describe the Association's filing of the cross-claim for declaratory judgment as a "race to the courthouse." On the contrary, petitioners and the Association were already in the courthouse originally chosen by the petitioners.

In March, 1991 the London arbitrators fixed a hearing date for arbitration to commence on February 24, 1992. Eagle and petitioners complained to the federal district court that the arbitration was taking too long and was too costly. Eagle's Texas counsel, George Renaudin, wrote the district court that Eagle and Kikis would no longer participate in the arbitration. In response to these complaints, in July, 1991 the Association moved the arbitrators to rule on certain preliminary issues which, if favorable to the Association, would substantially shorten the arbitration process. In their Statement of the Case (p. 7), petitioners describe this shortened process as "suspicious", all the

while ignoring the fact that the process was shortened in response to Eagle's and petitioners' complaints about the length and cost of the arbitration.

The arbitrators agreed with the Association, and scheduled the arbitration hearing in London on November 7-8, 1991, before the three-man tribunal. Despite his Texas counsel's letter to the court that he would no longer participate in the arbitration, Mr. Kikis appeared at the arbitration *pro se*, having earlier parted ways with his London counsel. Mr. Kikis, a Princeton graduate and a principal in several international shipping concerns, stated he was thoroughly familiar with the arbitration process. He explained he preferred to represent himself because he was more knowledgeable of arbitration proceedings, and he could do a better job than the lawyers. The transcript of the arbitration proceedings, which lasted two days, was introduced into evidence in the district court. That transcript shows clearly that Mr. Kikis presented Eagle's position, submitted evidence, and cross-examined witnesses. He made no complaints about the conduct of the proceeding, did not ask for a continuance, and acknowledged at the conclusion of the hearings that he had been treated fairly.

On January 2, 1992 the arbitration panel issued a unanimous award ruling that Eagle had no right of recovery against the Association because, first, Eagle had breached a Rule that voided coverage, and second, the insurance contract was for indemnity only and Eagle had paid no part of the underlying judgment.

The Association moved the district court to confirm the arbitration award and to dismiss Eagle's third-party

complaint, which the court granted (App. 14). The Association also moved for summary judgment on the Association's cross-claim against the petitioners (as well as the petitioners' counterclaim against the Association), on the grounds that the petitioners had no standing to pursue a direct claim against the Association to collect the judgments which Eagle had never paid, and had no standing to assert bad faith or extracontractual claims under state law. The district court granted the summary judgment on both grounds. (App. 10).

Petitioners and Eagle appealed to the Fifth Circuit. Eagle filed no brief, however, and the Fifth Circuit dismissed Eagle's appeal. Petitioners argued that the district court should have declined to entertain the declaratory judgment action. The Fifth Circuit rejected that argument, ruling that the district court did not abuse its discretion because the plaintiffs originally chose that forum and later themselves filed a counter-claim for declaratory judgment, rather than filing their earlier threatened state action.

Petitioners also argued that under the laws of England and Texas they had the right to directly sue the Association to collect their judgments and to assert extracontractual damages. The Fifth Circuit ruled that petitioners' arguments concerning English law had been definitely rejected in *Firma C-Trade S.A. v. Newcastle P. & I. Ass'n,* Lloyd's Rep. (Vol.2) 191 (H.L. 1990), where the House of Lords ruled that until an insured pays a loss under an indemnity policy, neither the insured nor third parties have any right to payment under the policy. Turning to Texas state law, the Fifth Circuit cited several firmly rooted decisions holding that third party claimants

have no direct right of action, either to collect the proceeds of an indemnity policy or to assert extracontractual causes of action.

Petitioners' contention that the arbitration proceeding was a "de facto" default is a gross mischaracterization and based exclusively on an affidavit of George Renaudin, Eagle's Texas counsel (App. 39-43). Yet, Mr. Renaudin was not present at the hearings and had no personal knowledge of the proceedings. He had not even discussed it with Mr. Kikis. His affidavit is not credible for that reason and, more importantly, because it is in direct conflict with the transcript of the arbitration hearing.

Petitioners also misstate their role in the arbitration proceedings. In their petition they paint themselves as having had no knowledge of or participation in the arbitration proceedings and feign surprise when they learned an adverse award was rendered. The truth is that petitioners' counsel was well aware of the proceedings and, in fact, originally helped orchestrate Eagle's position in the arbitration. Eagle's London arbitration counsel considered the petitioners' counsel as their professional client, and was actually originally instructed by petitioners' counsel.

Petitioners misleadingly state (p. 6) that the arbitration award was rendered "[b]efore discovery was initiated" by them. The truth is that the district court had delayed consideration of the Association's original motion for summary judgment because petitioners asked for a delay to conduct discovery. But, petitioners never bothered to initiate any discovery.

Finally, Petitioners state (p. 8) that the district court refused to review the arbitration award. In fact, the district court did review the award in accordance with settled law, and found no infirmity in the award or any basis to refuse its enforcement.

Contrary to the representation made in petitioners' petition (pp. 10-13), the Fifth Circuit did not in a "roundabout" way rule that petitioners were bound by the arbitration award. Yet, it is on this erroneous representation that the petitioners' Due Process argument rests. The Fifth Circuit clearly held that petitioners had no standing to contest the arbitration award, because they had no rights in the indemnity insurance contract. For that reason, the Fifth Circuit did not address petitioners' objections to the arbitration award.

REASONS THE WRIT SHOULD BE DENIED

1. The Lower Courts' Decisions Are Correct And Based On Settled Legal Principles – There Are No Important, Unsettled Questions Of Federal Law

If everything petitioners say in their petition were true – and very little of what they say about the law or the facts is true – there would still be no reason to grant a writ of certiorari. As prescribed by Rule 10 of this Court, there are no "special and important reasons" for granting a writ. Specifically, the decision of the Fifth Circuit is clearly not in conflict with decisions of another court of appeals, nor does it decide a federal question in conflict with the Texas Supreme Court. The petition identifies no important, unsettled questions of federal law that should

consume this Court's time. Petitioners' petition is remarkable because it does not even make a pretense that there is such an issue in this case.

Petitioners are simply asking this Court to review alleged errors in the Fifth Circuit's decision and to correct those errors. Petitioners obviously misperceive this Court's role. As this Court has itself instructed on numerous occasions, its role is to take up unsettled legal issues that are "of importance to the public, as distinguished from that of the parties . . . ." *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), quoting from *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923). Rule 10 of the Supreme Court Rules embodies this standard for granting the writ of certiorari, and none of the legal principles discussed in the Fifth Circuit's opinion or in the petitioners' petition satisfy that criteria.

As discussed below, petitioners' Due Process arguments are predicated on the mistaken proposition that petitioners have a protected interest in the contract of indemnity insurance, but the cases on which petitioners rely all concern liability insurance, not indemnity insurance. Petitioners wholly fail to acknowledge this critical, basic distinction. Petitioners' arguments quickly collapse once that vital distinction is recognized. As for petitioners' claims for extracontractual causes of action under Texas law, petitioners plainly have no standing to make those claims, as the Texas Supreme Court held in a recent decision, *Allstate Ins. Co. v. Watson*, 37 Tex.Sup.Ct. J. 408 (Jan. 12, 1994). Petitioners not only ignore that decision, but fail to inform this Court that they made both contractual and extracontractual claims. Under both Texas law and English law petitioners simply have no property

interest in an indemnity policy and, for that reason alone, have no standing for their Due Process arguments.

2. Judgment Creditors Of A Shipowner, Having No Property Rights In An Indemnity Insurance Contract, Have No Right Of Action Against The Insurer On The Contract Or To Assert Extracontractual Claims Under State Law

Petitioners fashion their Due Process argument by, first, completely ignoring the indemnity nature of the insurance contract in this case and, second, wrongly assuming that they have rights as judgment creditors to proceed directly against an indemnity insurer on both their contractual and extracontractual claims.

The insurance contract is one of indemnity only. The district court so ruled in the course of ordering arbitration. The arbitrators also correctly recognized the indemnity nature of the contract. Petitioners, on the other hand, turn a blind eye to that vital distinction. The cases cited by petitioners (p. 9) all concern liability policies, which contain provisions allowing judgment creditors to collect directly under the liability policies. Indemnity policies have no such provisions. On the contrary, indemnity policies, such as the present insurance contract, specifically state that the insured must pay to be paid. The courts have consistently held that under such policies no one, including the insured, has a right of recovery until a loss has actually been paid by the insured. *Continental Oil Co. v. Republic Ins. Co.*, 819 F.2d 120 (5th Cir. 1987); *Weeks v. Beryl Shipping, Inc.*, 845 F.2d 304 (11th Cir. 1988); *Ahmed v. American Steamship Owners Mutual Protection & Indemnity*

Ass'n, 640 F.2d 993 (9th Cir. 1981); *Stuyvesant Ins. Co. v. Nardelli*, 286 F.2d 600 (5th Cir. 1961). Notwithstanding the Rules breach, since Eagle never paid any part of the underlying judgments, Eagle had no claim to funds from the Association, nor did the judgment creditors have any claim. This is also true under English law, *Firma C-Trade S.A. v. Newcastle Protection & Indemnity Ass'n*, Lloyd's Rep. (Vol. 2) 191 (H.L. 1990). In the lower courts the petitioners vigorously argued that English law applied, but now appear to have abandoned that contention.

Without establishing a property interest that is subject to Due Process guarantees, petitioners' Due Process arguments crumble. These salient rules have long existed:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

Petitioners cannot, and do not, point to any decision under state law that gives them any property right in an

indemnity insurance contract, because the law is settled that no such right exists.

Similarly, petitioners can point to no state law that gives them standing to make extracontractual claims. The law is to the contrary. In *Allstate Ins. Co. v. Watson*, 37 Tex.Sup.Ct.J. 408 (Jan. 12, 1994), the Texas Supreme Court ruled without equivocation that third parties to an insurance contract including liability policies, have no standing to assert extracontractual claims. This ruling solidified both the lower Texas appellate courts' and the Fifth Circuit's rejection of bad faith claims by injured third parties. *Warfield v. Fidelity & Deposit Co.*, 904 F.2d 322 (5th Cir. 1990) (under Texas law); *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 832 F.2d 850 (5th Cir. 1988) (under maritime law); *Bowman v. Charter General Agency, Inc.*, 799 S.W.2d 377 (Tex.App. – Corpus Christi 1990, no writ); *Chaffin v. Transamerica Ins. Co.*, 731 S.W.2d 728 (Tex.App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.).

In sum, petitioners' Due Process arguments must fail because they assume incorrectly that they have protected property rights in an indemnity insurance contract, and they plainly do not.

3. Petitioners Have No Standing To Contest An Arbitration Award Concerning A Contract To Which They Are Not Parties.

Desperate to attack the arbitration award, petitioners inaccurately state that the Fifth Circuit in a "roundabout" way held that petitioners are bound by the arbitration award and, therefore, petitioners must have a

right to attack the award, which they describe as the product of a "de facto" default proceeding.

The Fifth Circuit did not rule, in a direct way or in a "round-about" way, that petitioners were bound by the arbitration award. Quite to the contrary, the Fifth Circuit ruled very plainly that petitioners possessed no rights in the insurance contract and, consequently, had no standing to attack the arbitration award. Eagle, which did have a right to attack the award, and was unsuccessful in its attack before the district court, filed no appellate brief. Eagle's appeal was therefore dismissed. And, Eagle has not sought review in this Court.

Moreover, describing the arbitration award as a "de facto" default proceeding is simply wrong. Such a mischaracterization is based solely on an argumentative affidavit submitted by attorney George Renaudin, who was not at the hearings and had no personal knowledge or even hearsay knowledge of what transpired. That is obvious when one compares the statements made in that affidavit with the facts contained in the actual transcript of the proceedings. The affidavit had no merit and was duly rejected by both the district court and the Fifth Circuit.

CONCLUSION

There is no reason to grant a writ of certiorari in this case. The decision of the Fifth Circuit is in accordance with settled legal principles and is in conflict with no other case. The writ should be denied.

Respectfully submitted,

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